

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

IDALIA HERNANDEZ

Claimant

VS.

TYSON FRESH MEATS, INC.

Self-Insured Respondent

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Docket No. 258,902

ORDER

Through her present attorney, Diane F. Barger, claimant appealed the January 4, 2007, Order entered by Administrative Law Judge Brad E. Avery. The Board placed this appeal on its summary docket for disposition without oral argument. Both Ms. Barger and claimant's former attorney, Michael G. Patton, filed briefs with this Board setting forth their respective arguments.

ISSUES

This is another appeal in the ongoing acrimonious dispute between Ms. Barger and Mr. Patton over attorney fees and their claims for sanctions against each other. In addition, in an earlier appeal to the Board Ms. Barger challenged \$33.27 in expenses the Judge had awarded to Mr. Patton and Ms. Barger had challenged the manner the Judge divided the costs of certain transcripts.

A brief procedural history will help in understanding Ms. Barger and Mr. Patton's present disagreement. This saga began when Judge Avery issued an Award in this claim on April 13, 2005, which also addressed Mr. Patton's claim for attorney fees. Unfortunately, Mr. Patton was given neither notice nor an opportunity to be heard on that issue. Consequently, the Board in its Order of September 30, 2005, remanded the issue of Mr. Patton's attorney fees to the Judge to allow Mr. Patton to be heard.

In a July 25, 2006, Order for Attorney Fees, Judge Avery ruled on Mr. Patton's request for fees. Moreover, the Judge also addressed a request for sanctions Mr. Patton had made against Ms. Barger. In the July 25, 2006, Order, Judge Avery determined Mr. Patton should receive 25 percent of the 10 percent permanent partial general disability benefits respondent began paying shortly after the August 2003 pre-trial settlement

conference.¹ The Judge also awarded Mr. Patton expenses in the sum of \$269.30 and sanctions against Ms. Barger in the sum of \$330 for failing to comply with an order compelling discovery. The Judge, however, did not address Ms. Barger's request for sanctions against Mr. Patton.

Claimant and Ms. Barger appealed the July 25, 2006, Order to this Board. In its Order dated September 29, 2006, the Board ruled, as follows:

1. The Judge should simultaneously consider and determine the attorney fees of both Ms. Barger and Mr. Patton and apportion those fees. Accordingly, the Board remanded this proceeding to the Judge to simultaneously determine the fees of both attorneys.
2. Judge Avery had the authority to assess sanctions under K.S.A. 2005 Supp. 44-551(b)(1) to compel the production of documents and records.
3. The Board affirmed the sanctions against Ms. Barger in the sum of \$330 for her failure to comply with the Judge's order to produce designated records.
4. The Judge did not address Ms. Barger's request for sanctions against Mr. Patton. Accordingly, the Board remanded the claim to the Judge to address that issue and Mr. Patton's request for additional sanctions.
5. Mr. Patton should be reimbursed \$33.27 in expenses that were questioned as those expenses were directly related to Mr. Patton's representation of claimant.
6. The Board affirmed the Judge's order that Ms. Barger and Mr. Patton equally share the transcript costs that were incurred in their dispute over attorney fees.

In the January 4, 2007, Order, Judge Avery addressed the Board's order for remand. The Judge first determined the maximum amount available in attorney fees was \$19,105.36, which is 25 percent of the \$76,421.42 in total disability benefits awarded. The

¹ The parties initially represented those payments began before claimant terminated Mr. Patton's services. But according to a letter from respondent's counsel that Ms. Barger attached to her pleadings, the payments began in September 2003, which was after Mr. Patton was discharged.

Judge next concluded Mr. Patton should receive attorney fees in the sum of \$3,022.97, which represents 25 percent of the \$12,091.86 that respondent began paying in permanent partial disability benefits for claimant's functional impairment, which the Judge mistakenly believed commenced while Mr. Patton was representing claimant. Third, the Judge determined Ms. Barger should receive \$16,082.39 in attorney fees, which represents 25 percent of the remaining award balance of \$64,329.56. And fourth, the Judge denied Ms. Barger's request for sanctions and denied Mr. Patton's request for additional attorney fees and sanctions against Ms. Barger.

Ms. Barger contends Judge Avery erred. Although Ms. Barger had previously urged the Judge to award Mr. Patton the same amount of attorney fees awarded, Ms. Barger now challenges those fees. Ms. Barger also contends the Judge erred by denying her sanctions against Mr. Patton for filing a request for the production of documents citing Chapter 60 of the Kansas Statutes Annotated. In short, Ms. Barger requests the Board to reverse the January 4, 2007, Order and to assess sanctions against Mr. Patton.

The Board notes that Ms. Barger and claimant also continue to challenge the earlier rulings of the Judge and the Board in its September 29, 2006, Order regarding the sanctions assessed against Ms. Barger, the \$33.27 in expenses that were awarded to Mr. Patton and the division of transcript costs.² But those issues are not pertinent to this appeal as they have been previously addressed.

Mr. Patton argues the Board should deny Ms. Barger's requests. He also notes some of the issues raised by Ms. Barger in this appeal were previously decided.

The issues before the Board on this appeal are:

1. What is a reasonable attorney fee for Mr. Patton and for Ms. Barger for their work in this proceeding?
2. Is Ms. Barger entitled to sanctions against Mr. Patton for filing a request for production of documents that cited a discovery statute from Chapter 60 of the Kansas Statutes Annotated?

² Ms. Barger argues claimant should not pay one-half the transcript costs in question. But the Board's September 29, 2006, Order is clear that Ms. Barger (not claimant) and Mr. Patton were ordered to evenly share those transcript costs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After considering the record and the arguments presented by Ms. Barger and Mr. Patton, the Board finds and concludes the January 4, 2007, Order should be affirmed.

Attorney fees

As indicated above, Judge Avery first determined the maximum amount of attorney fees that could be awarded based upon 25 percent of the \$76,421.42 that was awarded to claimant in disability benefits.

The Judge then attributed \$12,091.86 of those disability benefits to the services rendered by Mr. Patton and attributed \$64,329.56 in disability benefits to the services rendered by Ms. Barger.

As stated in this Board's earlier Order of September 29, 2006, the attorney fees in a workers compensation proceeding *shall not exceed a reasonable amount* for the services rendered *and* shall not exceed 25 percent of the disability compensation recovered.³ Moreover, attorney fees may be apportioned between attorneys in a reasonable and proper manner, considering the particular circumstances in each case.⁴

Considering the particular circumstances of this claim, the Board is not persuaded that Judge Avery erred in the division of attorney fees between Ms. Barger and Mr. Patton. Accordingly, the Board affirms that division.

Mr. Patton represented claimant from August or September 2000 through late August 2003, which was during the initial stages of claimant's workers compensation claim. That period included a good portion of claimant's medical treatment and continued through an August 2003 pre-hearing settlement conference.⁵ Until a worker completes medical treatment, the residual effects of the injury with respect to the worker's permanent functional impairment and permanent work restrictions are usually unknown. And an attorney renders valuable services to an injured worker merely by monitoring a worker's medical treatment to insure the worker is receiving appropriate treatment.

³ See K.S.A. 44-536(a).

⁴ See K.S.A. 44-536(h) and *Madison v. Goodyear Tire & Rubber Co.*, 8 Kan. App. 2d 575, 663 P.2d 663 (1983).

⁵ Mr. Patton's itemized statement indicates he attended a regular hearing in August 2003, but it appears the type of hearing may be a typographical error as on the date noted the parties had a pre-hearing settlement conference, according to the Division's records.

Although the Judge may have mistakenly believed respondent began paying claimant permanent partial general disability benefits before claimant discharged Mr. Patton, the Board finds such mistaken belief is of no consequence as the Board finds those benefits are attributable to the services Mr. Patton provided claimant.

When apportioning fees between attorneys, the primary test is what is reasonable in light of the services each rendered. And in determining reasonableness, K.S.A. 44-536(b) lists the following factors to be considered:

1. The written offers of settlement made by the employer before the worker and attorney entered into their contract.
2. The time and labor required, and the novelty and difficulty of the issues involved and the skill required to perform the legal services properly.
3. The likelihood, if apparent to the worker, that accepting the worker's claim would preclude other employment by the attorney.
4. The fee customarily charged in the community for similar services.
5. The amount of compensation involved and the results obtained.
6. The time limitations imposed by the worker or the circumstances.
7. The nature and length of the professional relationship with the worker.
8. The experience, reputation and ability of the attorney.

The Board recognizes that Mr. Patton helped claimant through the medical stage of her claim and helped her obtain permanent disability benefits based upon functional impairment. On the other hand, a review of both attorneys' itemized time records indicates Ms. Barger developed claimant's work disability (a permanent partial general disability greater than the functional impairment rating).⁶ Had the Board been persuaded that the

⁶ Ms. Barger has challenged Mr. Patton's itemized statement. But both itemized statements raise some questions regarding the time recorded. Nonetheless, the Board is not implying the attorneys have misrepresented their time as further itemization could, perhaps, further explain the questionable entries. For example, Ms. Barger's itemized statement shows she wrote 10 letters to various health care providers on October 13, 2003, which allegedly took 2.5 hours to prepare what was probably one form letter with 10 different addressees. In any event, the Board finds the statements represent estimates of the time the attorneys actually expended representing claimant in this claim.

work Mr. Patton performed had actually laid the foundation for claimant's work disability claim or that Mr. Patton had in some other way benefitted the claim for work disability benefits, that factor would have been given appropriate weight and, perhaps, changed the division of fees. But in this instance, it appears Mr. Patton went to a pre-hearing settlement conference (and possibly another) before developing a claim for work disability and there is little evidence that his services furthered claimant's receipt of work disability benefits.

Ms. Barger's challenge of the amount of the fee awarded Mr. Patton is disingenuous as she initially requested the Judge to award that fee. In her May 19, 2006, pleading entitled *Supplement to Claimant's Brief on Compensation Allowed for a Discharged Attorney*, Ms. Barger prayed the Judge would award Mr. Patton 25 percent of the amount of \$12,091.86. In addition, at the May 19, 2006, hearing for attorney fees Ms. Barger stated:

Mr. Patton has asked for an amount that exceeds the 25 percent of contingency fee that he would receive for the amount of benefit he inured for the claimant. While during the representation of the claimant, IBP, now known as Tyson Fresh Meats, voluntarily started paying on a 10 percent functional whole body. That amounted to \$12,091.86, **and I have no argument with his contract or with his getting attorney's fees for obtaining that amount of money for the claimant because it benefited [sic] the claimant.** Anything else that Mr. Patton is asking for that is above 25 percent of the voluntary payment of 10 percent whole body at \$12,091.86 is unjust enrichment and the contract, the contingency contract is, is now no longer good, and it becomes the matter of reasonable value of his services. His services that he has enumerated --⁷ (Emphasis added.)

And Ms. Barger's expert witness, former District Court Judge Randall Fisher, testified that such fee was "reasonable and adequate compensation for all the work he [Mr. Patton] did."⁸

Moreover, at a July 7, 2006, hearing Ms. Barger praised Judge Avery's *good* and *wise* decision regarding the amount the Judge awarded Mr. Patton.

With that in mind, Your Honor, I'd ask that you grant -- you made a good -- you made a wise decision. You gave Mr. Patton 25 percent of the amount that Tyson paid that they started voluntarily paying when he was representing her.⁹

⁷ Attorney's Fees Hearing Trans. (May 19, 2006) at 8, 9.

⁸ *Id.* at 28.

⁹ Attorney's Fees Hearing Trans. (July 7, 2006) at 13, 14.

Ms. Barger's request for sanctions

During litigation of the attorney fees issue, Mr. Patton filed a request for Ms. Barger to produce copies of her employment contract, time records, and expense records. In that request, Mr. Patton cited a discovery statute from Chapter 60 of the Kansas Statutes Annotated. When Ms. Barger did not respond, Mr. Patton then filed a motion to compel discovery and for sanctions. Ms. Barger responded by filing a response to the motion to compel and by requesting sanctions be ordered against Mr. Patton.

Ms. Barger contends she is entitled to receive sanctions and attorney fees from Mr. Patton under K.S.A. 44-536a as Mr. Patton's request for the production of documents and the motion to compel production were frivolous pleadings. Ms. Barger bases her argument on the fact that the Workers Compensation Act does not have rules or regulations pertaining to the production of documents.

It is important to note that Ms. Barger does not challenge the Judge's authority to order the production of documents. Instead, she argues there is no statutory authority for a party to request that production of documents.

As the Board found in its September 29, 2006, Order, the Workers Compensation Act lacks specific rules of discovery. Nonetheless, the Act empowers the administrative law judges with the same power and authority to compel the production of documents as possessed by the district court judges.

Unlike Chapter 60 of the Kansas Statutes Annotated, the Workers Compensation Act does not have specific statutes that address the rules of discovery. Likewise, administrative rules and regulations have not been adopted regarding discovery in workers compensation claims. But, the Act does grant the administrative law judges broad powers to compel the production of documents to the same extent as rests with the district courts. K.S.A. 2005 Supp. 44-551(b)(1) provides, in pertinent part:

Administrative law ***judges shall have power to*** administer oaths, certify official acts, take depositions, issue subpoenas, ***compel*** the attendance of witnesses and the production of books, accounts, papers, documents and records ***to the same extent as is conferred on the district courts of this state***, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges. (Emphasis added.)¹⁰

¹⁰ *Hernandez v. Tyson Fresh Meats, Inc.*, No. 258,902, 2006 WL 3328558 (Kan. WCAB Sept. 29, 2006).

In short, the Workers Compensation Act does not provide a procedure to request an order for the production of documents. The Act, however, does have one statute, K.S.A. 2006 Supp. 44-523, that deals with procedure and it generally provides that administrative law judges are not bound by technical rules of procedure. Instead, the judges are given wide latitude to insure the parties are given a reasonable opportunity to be heard and *to present evidence*.

The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.¹¹

Consequently, the fair implication is that any procedure that is appropriate and not prohibited by the Act may be used.¹² In both *Bushey* and *Drennon*, the workers compensation examiner (the predecessor to the present administrative law judges) utilized procedures that were not set forth in the Workers Compensation Act. In both cases, the Kansas Supreme Court ruled the examiner did not err. Moreover, the Court in *Drennon* rejected the specific argument that Ms. Barger now makes. The Kansas Supreme Court wrote:

To support their position the appellants rely upon the oft-quoted statement in our decisions to the effect that:

“ . . . the workmen’s compensation act establishes a procedure of its own, and that the procedure furnishes a remedy which is substantial, complete and exclusive in compensation cases. . . .” (Citations omitted.)

What the appellants fail to note in the foregoing quotation is that it is the *remedy* which is said to be substantial, complete and exclusive and not the procedure provided in the workmen’s compensation act.¹³

Finally, the Board notes the Kansas Court of Appeals in *McIntyre*¹⁴ specifically referred to Chapter 60 of the Kansas Statutes Annotated to determine the number of days

¹¹ K.S.A. 2006 Supp. 44-523(a).

¹² *Bushey v. Plastic Fabricating Co.*, 213 Kan. 121, 515 P.2d 735 (1973); *Drennon v. Braden Drilling Co., Inc.*, 207 Kan. 202, 483 P.2d 1022 (1971).

¹³ *Drennon* at 207, 208.

¹⁴ *McIntyre v. A.L. Abercrombie, Inc.*, 23 Kan. App. 2d 204, 929 P.2d 1386 (1996).

a party had to file an appeal with this Board, despite the fact there was a regulation that addressed the topic.

Mr. Patton's request for production should be treated as a request for an order for production of documents. The fact Mr. Patton cited a discovery statute from Chapter 60 of the Kansas Statutes Annotated does not make the request for documents frivolous. The Board specifically rejects Ms. Barger's argument that a judge has the authority to order documents but there is no procedure or mechanism to request those documents. Accordingly, the Board finds the Judge did not err in denying Ms. Barger's request for sanctions against Mr. Patton.

WHEREFORE, the Board affirms the January 4, 2007, Order entered by Judge Avery.

IT IS SO ORDERED.

Dated this ____ day of March, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING AND DISSENTING OPINION

The undersigned Board Members agree with the findings and conclusions of the majority except as to the decision to affirm the Administrative Law Judge's division of attorney fees. The Administrative Law Judge based his determination on the contingency portion of the attorney fee contracts instead of using quantum meruit as directed by the Board. In addition, the contingency did not occur during the time that Mr. Patton represented claimant as the respondent did not commence making voluntary permanent partial disability compensation payments until after the date of Mr. Patton's termination by claimant.

The Board remanded the issue of attorney fees to the Administrative Law Judge with instructions “to simultaneously address the attorney fees to be awarded both Ms. Barger and Mr. Patton.”¹⁵ At that time the Board stated:

A workers compensation claim moves through numerous stages as the claim progresses from the initial injury through medical treatment to maximum medical improvement to quantifying the worker’s permanent disability and the ultimate award of benefits. And services rendered in the initial stages of the claim may or may not contribute to the ultimate recovery and, therefore, those services may be a factor in determining the reasonable value of an attorney’s services. In addition, there is only a finite amount of funds that can be used to compensate the attorneys who assisted claimant in this proceeding. To the extent one attorney receives a fee, the amount available to the other attorney may be reduced.¹⁶

As the majority notes, Mr. Patton represented claimant over a three-year period. During much of that period claimant was either not yet at maximum medical improvement or was still working in accommodated employment with respondent and not eligible for a work disability. Nevertheless, it cannot be said that Mr. Patton’s services in obtaining claimant’s preliminary benefits and ensuring claimant continued to receive appropriate medical treatment and accommodated employment were less valuable than Ms. Barger’s subsequent successful efforts in obtaining permanent partial disability compensation. Both attorneys provided the service that was appropriate to the time period of their respective representations of claimant.

Accordingly, the undersigned would award to each attorney from the total amount available for attorney fees (25 percent of the total amount of disability compensation awarded and paid) that amount which represents their proportionate share of the total time spent by both attorneys representing claimant, exclusive of the time spent litigating attorney fees.

Mr. Patton’s itemized Client Billing Worksheet shows he spent 56.3 hours performing legal services for claimant before being terminated by claimant. Ms. Barger’s Itemization of Services shows she spent approximately 171.1 hours, excluding the time entries pertaining to the issue of Mr. Patton’s attorney fee lien. Of the total 227.4 combined hours spent by both attorneys performing services for claimant, Mr. Patton’s 56.3 hours represents approximately 25 percent and Ms. Barger’s 171.1 hours represents approximately 75 percent. Therefore, as the total disability compensation awarded is

¹⁵ *Hernandez v. Tyson Fresh Meats, Inc.*, No. 258,902, 2006 WL 3328558 (Kan. WCAB Sept. 29, 2006).

¹⁶ *Id.*

\$76,421.42 and 25 percent of that is \$19,105.36, then Mr. Patton should be awarded \$4,776.34 (25 percent of \$19,105.36) and Ms. Barger should receive \$14,329.02 (75 percent of \$19,105.36).

BOARD MEMBER

BOARD MEMBER

c: Diane F. Barger, Attorney for Claimant
Michael G. Patton, Former Attorney for Claimant
Gregory D. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge